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No. 86

In the Supreme Court of the United States

OCTOBER TERM, 1944

REGAL KNITWEAR CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below (R. 287–289) is reported in 140 F. (2d) 746. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 252–276) are reported in 49 N. L. R. B. 560.

JURISDICTION

The decree of the court below (R. 290–291) was entered on March 3, 1944. The petition for a writ of certiorari was filed on May 15, 1944, and was granted on October 9, 1944, limited to the sixth question presented in the petition (R. 292). The

jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether, in the exercise of its administrative discretion to prevent and remedy unfair labor practices, the Board may properly direct its orders not only against the employer but also against his "successors and assigns".

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 36–37.

STATEMENT

Upon the usual proceedings the Board, on May 7, 1943, issued its findings of fact, conclusions of law, and order (R. 252–276). The Board found that petitioner, a New York corporation, had discriminatorily discharged an employee because of her membership and activities in behalf of a labor organization, and had otherwise, interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by the National Labor Relations Act, thereby engaging in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (R. 253–255, 260–271). Its order followed the usual form, directing petitioner, "its officers, agents, successors, and

assigns" to cease and desist from engaging in the unfair labor practices found, to reinstate the discharged employee and make her whole with back pay, and to post appropriate notices (R. 255–256).

Thereafter the Board filed a petition for enforcement in the Circuit Court of Appeals for the Second Circuit (R. 284–287). On February 15, 1944, the court in a *per curiam* opinion upheld the Board's order (R. 287–289), and on March 3, 1944, entered its decree enforcing the order, including the provision here in question (R. 290–291).

SUMMARY OF ARGUMENT

The Board's practice of directing its orders against the successors and assigns of an employer, as well as against the employer, is a sound exercise of the board administrative discretion vested in the Board by the National Labor Relations Act. The Board has consistently followed this practice since 1937. This Court and all of the Circuit Courts of Appeals except that for the Seventh Circuit have regularly enforced this provision. Other administrative agencies which have employed a similar form of order include the Federal Trade Commission, the Bituminuous Coal Division of the Department of the Interior, the Securities and Exchange Commission, and various state labor relations boards.

Although there are numerous ways in which the legal ownership of a business may be changed, the question of the scope of the "successors and assigns" provision may arise in three types of situations: (1) the *bad faith successor or assign*, (2) the *alter ego*, and (3) the *good faith successor or assign*, who takes over and operates a continuing business. The binding effect of Board orders on those successors and assigns who fall into the first two categories is clear. Such successors and assigns are bound even in the absence of an order explicitly directed against them. As to such persons, inclusion of the "successors and assigns" provision is a reasonable exercise of the Board's discretion, not only because of the salutary effect that may be exercised upon the employees, the offending employer, and anyone who might be inclined to connive with him in avoiding compliance with Board orders, but also because of the obvious desirability of making administrative orders as explicit as the circumstances permit.

It is the Board's position that good-faith successors and assigns, or new owners of a continuing business, may also be properly bound by Board orders. The Board believes that effectuation of the policies of the Act requires one who takes over a continuing business and operates it in the place of an employer found by the Board to have engaged in unfair labor practices should also be

bound by the order from and after the date he has notice of such order. In a continuing business, the group relationship of employees and supervisory personnel does not change by mere shifts in ownership. To eradicate the effects of unfair labor practices employees must be assured that supervisors who once were part of an anti-union organization are no longer free to continue anti-union conduct. They must be assured that members of their group who lost their employment because of union activity may resume their place in the group, without having suffered any loss in pay. They must be assured that company-sponsored labor organizations cannot be recognized by the new owners. They must be assured that the new employer cannot benefit from the former owner's refusals to bargain.

The Board's authority to bind successors and assigns in the last category as well as in the first two is implicit in the broad administrative powers vested by Congress in the Board to prevent and remedy unfair labor practices. Its authority arises out of the necessity of bringing the employing industry "within the corrective and remedial provisions of the Act in the interest of industrial peace" (*National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6)), thereby vindicating the public policy which the Act was designed to effectuate.

ARGUMENT

IN EXERCISING ITS ADMINISTRATIVE DISCRETION TO PREVENT AND REMEDY UNFAIR LABOR PRACTICES, THE BOARD MAY PROPERLY DIRECT ITS ORDERS NOT ONLY AGAINST THE EMPLOYER BUT ALSO AGAINST HIS "SUCCESSORS AND ASSIGNS"

Upon finding that an employer has engaged in unfair labor practices affecting commerce, the Board normally orders the employer, "its officers, agents, successors, and assigns" to cease and desist from such practices and to take certain affirmative action which the Board finds will effectuate the policies of the Act. The Board has consistently followed this practice since its decision in *Matter of Hill Bus Company, Inc.*, 2 N. L. R. B. 781, decided May 3, 1937. The "successors and assigns" provision is included in the orders as a matter of course, and not necessarily because of any threat or other evidence in the record which might indicate that a successorship or an assignment is imminent. And so, in the present case, although the employer did not in any way indicate prior to the issuance of the Board's order (and, indeed, has not yet indicated) that any change in the ownership or operation of its business was contemplated, the Board nevertheless directed its order against petitioner's successors and assigns as well as against petitioner and its officers and agents (R. 255).

The Federal Trade Commission, long prior to the enactment of the National Labor Relations

Act, had issued orders containing similar provisions.[1] The Bituminous Coal Division of the Department of the Interior does not limit its cease and desist orders to the parties to its proceedings.[2] The Securities and Exchange Commission also has upon occasion obtained injunctions against successors and assigns and other persons incapable of being specifically named.[3]

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[1] See *e. g.*, *Matter of Superior Woolen Mills*, 8 F. T. C. 283, 288, decided December 8, 1924, in which the Commission directed its order against the party to the proceeding, "its successors, officers, directors, agents, servants and employees"; *Matter of American Snuff Co.*, 11 F. T. C. 144, 160, decided June 30, 1927, in which the Commission directed its order against the specific party to the proceeding and "its officers, agents, representatives, servants, employees, and successors"; *Matter of National Numbering Machine Co., Inc.*, 30 F. T. C. 139, 144, decided December 19, 1939, in which the Commission directed its order against the party to the proceeding "and its successors, together with its respective officers, directors, representatives, agents, and employees"; and *Matter of The Sherwin Williams Co., et al.*, 36 F. T. C. 25, 72, 74, decided January 8, 1943, in which the Commission directed its order against each of the parties to the proceeding, "its successors and assigns and its officers, directors, agents, and employees."

[2] See *e. g.*, *Matter of Cove Hill Coal Co.*, 7 F. R. 7572, 7574, decided September 22, 1942, wherein the order is directed against the defendant "its representatives, servants, agents, officers, employees, attorneys, receivers and successors or assigns and all persons acting or claiming to act on its behalf or in its interest"; and *Matter of Waltrip & Sons*, 7 F. R. 7864, decided September 30, 1942, in which an order was issued against named persons, "their representatives, agents, servants, employees, attorneys, successors, and assigns and all persons acting or claiming to act in their interest."

[3] See *e. g.*, *Securities and Exchange Commission* v. *Aldrich Blake, Inc.*, 1 S. E. C. Jud. Dec. 19, 21 (unreported) in which

Likewise the State Labor Relations Boards and Commissions customarily broaden the scope of their orders to cover future changes in ownership or operation of the businesses regulated [4] and courts of equity have not infrequently incorporated similar provisions in their decrees, particularly in antitrust suits.[5]

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an injunction was issued against the parties defendant, "their several agents, servants, representatives, employees, successors and assigns, and all persons acting by, through or under them, or any of them, or by or through their order"; and *Securities and Exchange Commission* v. *Foundation Plan, Inc.*, 31 F. Supp. 331, 340 (S. D. N. Y.), 1 S. E. C. Jud. Dec. 857, 870, in which an injunction was issued against the defendants, "their agents, servants, representatives and employees, and all others acting by or under their direction or authority, and all other persons in concert or participating with them."

[4] See *e. g.*, *Matter of Samuel Cohn d/b/a Atlantic Carriage Stores*, Case No. SE–8233 decided March 13, 1943, by the Massachusetts Labor Relations Commission, in which the order was directed against the respondent, "his agents, distributees, administrators, executors, successors, and assigns"; *Matter of The Great Atlantic and Pacific Tea Company*, Case No. CU–333 decided January 7, 1944, by the New York State Labor Relations Board, in which the order was directed against "respondent, its officers, agents successors, and assigns"; *Matter of W. T. Grant Company, Inc.*, Case No. 82, decided March 28, 1938, by The Pennsylvania Labor Relations Board, in which the order was directed against respondent, "its officers, agents, successors, and assigns"; *Matter of E. G. Shinner and Co., Inc.*, Case No. 668, decided August 24, 1938, by the Wisconsin Labor Relations Board, in which the order was directed against respondent, "its officers, agents, successors, and assigns."

[5] See *Warner and Co.* v. *Eli Lilly and Co.*, 265 U. S. 526, 532; *Aluminum Colors, Incorporated* v. *The Empire Plating Co.*, 5 F. Supp. 687 (N. D. Ohio 1933); *Sidway* v. *Missouri*

This Court and all of the Circuit Courts of Appeals except that for the Seventh Circuit have regularly enforced Board orders, otherwise proper, directed against the employer's successors and assigns. As this Court observed in *Southport Co.* v. *National Labor Relations Board*, 315 U. S. 100, 106, note 6, "This is the usual form of order, and has frequently been employed in cases where this Court has sustained Board orders." [6] Except for the Circuit Court of Appeals for the Seventh Circuit, every court which has expressly considered the point, including the Circuit Courts of Appeals for the First, Second, Third, Fourth, and Eighth Circuits and the Court of Appeals for the District of Columbia, has upheld the authority of the Board to in-

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Land & Livestock Co., 116 Fed. 381, 390 (Cir. Ct. S. D. Mo.); *Sebrone Co.* v. *Federal Trade Commission*, 135 F. (2d) 676 (C. C. A. 7); *United Gilpin Corp.* v. *Wilmore*, 100 Colo. 453, 456, 68 P. (2d) 34, 36; *United States* v. *Great Lakes Towing Co.*, 1 Decrees and Judgments in Federal Antitrust Cases, 253–254 (N. D. Ohio, 1915); *United States* v. *The Pullman Co.* (Civil Action No. 994, E. D. Pa., 1944); *United States* v. *Vehicular Parking, Ltd.* (Civil Action No. 259, D. Del., 1944).

[6] In the *Southport* case, *supra*, the alleged transfer of the business had occurred subsequently to the Board order but prior to the court's decree of enforcement. In discussing the operation of the decree, the Board's brief was directed mainly to a discussion of the obligations of the Southport Petroleum Company, but reference was also made to the obligations of any successor or assign, including a new owner taking in good faith. See Board brief in No. 67, October Term, 1941, pp. 22, 25–27, 28, 29.

clude such a provision.[7] In several of these cases there was a threatened, alleged, or proven change in ownership or operation of the employer's business;[8] in other cases there were no such special circumstances.[9] Except for one case involving unusual circumstances decided by the Circuit Court of Appeals for the Sixth Circuit,[10] only

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[7] *National Labor Relations Board* v. *Brezner Tanning Co., Inc.*, 141 F. (2d) 62, 65 (C. C. A. 1); *National Labor Relations Board* v. *Blackstone Manufacturing Co., Inc.*, 123 F. (2d) 633, 635 (C. C. A. 2); *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494, 498–499 (C. C. A. 3); *Union Drawn Steel Co.* v. *National Labor Relations Board*, 109 F. (2d) 587, 594–595 (C. C. A. 3); *National Labor Relations Board* v. *Landis Tool Company*, 15 L. R. R. 718 (C. C. A. 3); *National Labor Relations Board* v. *Jac. Feinberg Hosiery Mill, Inc.*, 134 F. (2d) 620 (C. C. A. 4); *National Labor Relations Board* v. *Gluck Brewing Co.*, 14 L. R. R. 791 (C. C. A. 8); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 650–651 (App. D. C.).

[8] *National Labor Relations Board* v. *Blackstone Manufacturing Co., Inc.*, 123 F. (2d) 633 (C. C. A. 2); *Union Drawn Steel Co.* v. *National Labor Relations Board*, 109 F. (2d) 587 (C. C. A. 3); *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494 (C. C. A. 3).

[9] *National Labor Relations Board* v. *Brezner Tanning Co., Inc.*, 141 F. (2d) 62 (C. C. A. 1); *National Labor Relations Board* v. *Landis Tool Company*, 15 L. R. R. 182 (C. C. A. 3); *National Labor Relations Board* v. *Jac. Feinberg Hosiery Mill, Inc.*, 134 F. (2d) 620 (C. C. A. 4); *National Labor Relations Board* v. *Gluck Brewing Co.*, 14 L. R. R. 791 (C. C. A. 8); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641 (App. D. C.).

[10] In *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. (2d) 295 (C. C. A. 6), the words were eliminated in a case involving discriminatorily discharged em-

the Circuit Court of Appeals for the Seventh Circuit has refused to enforce this provision."

The scope and validity of the provision

The meaning of the "successors and assigns" provision can be ascertained, of course, only by its application to particular factual situations. The Board has not undertaken to anticipate every possible set of circumstances which may arise, and to define in advance the extent to which the provision would impose obligations upon persons standing in the relation of "successors and assigns" to the employer. In this respect the Board has regarded the nature of the problem to be such that the lines of demarcation must be "pricked out by the gradual approach and contact of decisions on the opposing sides." (*Noble State Bank* v. *Haskell*, 219 U. S. 104, 112.) We shall consider later the question of the scope of the decree of enforcement entered in the case at bar, with particular reference to the construction given the

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ployees where the offending employer, prior to the hearing before the Board, had discontinued its business and had not resumed operations or sold its property at the time of the enforcement decree. The court held that the words in question might make it difficult or impossible for the employer to transfer its property to an independent *bona fide* purchaser.

[11] See *e. g.*, *National Labor Relations Board* v. *Bachelder*, 125 F. (2d) 387, 388 (C. C. A. 7); *National Labor Relations Board* v. *Stone*, 125 F. (2d) 752, 757 (C. C. A. 7) certiorari denied (employer's petition), 317 U. S. 649.

"successors and assigns" provision by the court below. At this point, however, we believe it will be helpful to discuss, in a general way, the nature and purposes of the provision, its application to varying factual situations, and its validity as thus applied.

Changes in the legal ownership of a business may occur in many ways. They may be involuntary, such as by death or involuntary bankruptcy or reorganization, or voluntary, such as by dissolution, amalgamation, merger, reorganization, sale, or otherwise. In some cases, the change may be related to a purpose to avoid compliance with the Act or with the Board's order or a decree of enforcement; in other cases, the change may be wholly unrelated to such a purpose. In general, however, the question of the applicability of the "successors and assigns" provision may arise in three classes of cases: (1) the *bad faith successor and assign*—where the employer for the purpose of avoiding compliance with the Board's order, by some form of transfer or reorganization, seeks to operate his business through a disguise or straw man; (2) the *alter ego*—where an employer for legitimate business reasons, such as seeking to reduce tax liability, reorganizes or forms a new corporation and continues or resumes the operation of his business through the same persons who operated it before the change; or where after death, bankruptcy, or receivership, the business

is continued by an executor, administrator, or other legal representative of the original employer; and (3) the *good faith successor and assign*—where the employer sells his business as a going concern to another, who, with or without knowledge of the Board's order, continues to operate the business without having any connection with the old employer.

(*1*) *and* (*2*). The Board's orders are unquestionably binding upon successors and assigns who operate as "merely a disguised continuance of the old employer" (*Southport Co.* v. *National Labor Relations Board*, 315 U. S. 100, 106) or as an *alter ego* of the offending employer. As to this aspect of the "successors and assigns" provision, there can be no doubt of the propriety of its inclusion in a Board order. An order of the Board is in the nature of an injunction, its cease and desist provisions restraining the performance of certain acts and its affirmative provisions making mandatory the performance of other acts. *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6); *National Labor Relations Board* v. *Bachelder*, 125 F. (2d) 387, 388 (C. C. A. 7). "An injunctive decree may bind not only the parties defendant but also those who are represented by them or are subject to their control or in privity with them." *Inter-*

national Brotherhood v. *Keystone Freight Lines*, 123 F. (2d) 326, 329 (C. C. A. 10); *In re Lennon*, 166 U. S. 548; compare 38 Stat. 738, 28 U. S. C. 383. Similarly, Board orders may bind persons who have not been named as parties to the proceeding if they have notice of such proceedings. Cf. *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 651 (App. D. C.). As Judge Learned Hand, speaking for the Circuit Court of Appeals for the Second Circuit, has said, "There can be no doubt that this is the law; equity has always treated as contumacious those who take an actual part in the defendant's own violation of its injunction, provided they have notice of the decree * * *." *National Labor Relations Board* v. *Blackstone Mfg. Co.*, 123 F. (2d) 633, 635 (C. C. A. 2).

Clearly, therefore, one who acts in privity with or connives with an offending employer in order to avoid compliance with a Board order may be held with the employer in contempt of the court's decree enforcing the order. *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. (2d) 302 (C. C. A. 2). And, if there has been merely a change in name or in apparent, but not actual, control of the employer, the Board's order is enforceable against the disguised employer or *alter ego* even though it may be operating as a distinct legal entity. *Southport Co.* v. *National Labor Relations Board*, 315 U. S. 100,

106. Indeed, "it could be only the blindness of formalism that would suggest separately instituted proceedings against the predecessor and the successor." *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. (2d) 39, 43 (C. C. A. 3); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 650–651 (App. D. C.); cf. *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. (2d) 930, 933, 942 (C. C. A. 1); *Union Drawn Steel Co.* v. *National Labor Relations Board*, 109 F. (2d) 587 (C. C. A. 3); *DeBardeleben* v. *National Labor Relations Board*, 135 F. (2d) 13 (C. C. A. 5); *National Labor Relations Board* v. *Adel Clay Products Co.*, 134 F. (2d) 342 (C. C. A. 8); *G. & C. Merriam Co.* v. *Saalfield*, 190 Fed. 927 (C. C. A. 6). And the Circuit Court of Appeals for the Seventh Circuit, which regularly eliminates from Board orders the provision relating to successors and assigns, recognizes that successors or assigns in the two categories discussed above are bound by the Board's order. *National Labor Relations Board* v. *Bachelder*, 125 F. (2d) 387, 388 (C. C. A. 7).

The latter court has apparently taken the position, however, that only bad faith successors and assigns or those who operate as an *alter ego* of the offending employer can be bound by orders of the Board, and that they would be so bound even if no express reference to them were made

in such orders. The court reasons, therefore, that the words "successors and assigns" are inserted in Board orders only for the purpose of binding good faith successors and assigns who would not otherwise be bound, and that the Board lacks authority to make its orders run against such persons. See *National Labor Relations Board* v. *Bachelder*, *supra*. But by the same process of reasoning, it would appear that the Circuit Court of Appeals for the Seventh Circuit should also eliminate the words "officers" and "agents" from Board orders. There can be no question as to the liability of officers of a corporate employer for engaging in conduct from which the corporation is enjoined even in the absence of their express inclusion in the order, for "a command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs." *Wilson* v. *United States*, 221 U. S. 361, 376; *Federal Trade Commission* v. *Education Society*, 302 U. S. 112, 119. For like reasons an agent is bound by the order against his principal although he is not expressly named in the order. *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294; *Sidway* v. *Missouri Land & Livestock Co.*, 116 Fed. 381, 390 (Cir. Ct. S. D. Mo.). Thus, it might be argued that the express inclusion of "officers" and "agents" implies a purpose to extend liability to some class of officers and agents who could not properly be bound. Clearly, this would be untenable.

We submit that with respect to "successors and assigns" within categories (1) and (2), as to whom the Board's orders unquestionably are binding, inclusion of the provision in its orders is a proper exercise of the Board's discretion. That "the provision merely makes explicit as to them that which the law already implies" (*Chase National Bank* v. *Norwalk*, 291 U. S. 431, 436–437) is no reason for striking it from decrees of *enforcement*. As *in other fields of the law*, the progress of administrative law has been towards more rather than less explicitness in the formulation of rules of conduct. Compare *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332; Report of the Attorney General's Committee on Administrative Procedure (S. Doc 8, 77th Cong., 1st Sess. pp. 102–103). It is desirable that interested persons should be made aware of the scope of administrative orders. In addition, there are special reasons for making explicit in Board orders that they also run against any "disguised continuance" or *alter ego* of the offending employer. The provision may have the effect of reassuring employees who have been subjected to unfair labor practices and who, consequently, may fear a continuation of such unfair labor practices or an attempt by their employer to avoid remedying the unfair labor practices; the provision may also help such employees to pursue their rights to self-organization with confidence and without fear of recriminations.

(3) We consider next the applicability of the "successors and assigns" provision to situations in which there has been a *bona fide*, complete change of ownership, and where the new ownership is in no sense a continuance of the old. Although there is some authority that even in the absence of a reference to successors and assigns in an administrative order, the order may be enforced against a good faith successor and assign who has notice of the order,[12] we shall assume, as was indicated in the *Southport* case, 315 U. S. at 106–107, that the "successors and assigns" provision in Board orders will in such cases "be the basis—and the indispensable basis—of liability"

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[12] See *I. C. C.* v. *Western N. Y. and P. R. Co.*, 82 Fed. 192, 194 (Cir. Ct. W. D. Pa. 1897), where subsequent to the issuance of an order against certain railroad companies, their ownership, operation, and control were transferred and where the successors were joined with the original owners in a petition for enforcement of an order of the Interstate Commerce Commission. The Circuit Court in enforcing the order against the successors stated: "It would indeed be lamentable if a lawful order against unjust discrimination by a railroad company, made by the interstate commerce commission after a protracted investigation, could be nullified by the subsequent reorganization of the company, or transfer of its railroad and franchises to another corporation. * * * This proceeding is for the enforcement of a public duty which is inseparable from the ownership of the railroad. No injustice is done to these new companies by joining them as defendants here, for they are entitled to be heard against the enforcement of the order of the commission, and the court is to proceed and determine 'in such manner as to do justice in the premises.'"

on the part of persons who take over the operation of a business.

The precise scope of the provision as applied to this type of situation will depend, we believe, upon the particular facts of cases arising either before the Board or, upon application by the Board, in contempt proceedings before a Circuit Court of Appeals. The factual issues to be determined in particular cases would cover a broad range, including, for example, whether the good faith successor or assign has taken over the same "business" (entailing an inquiry as to the character of the operations and the identity of the supervisory and operating personnel), the nature of the unfair labor practice, the extent to which the Board order or court decree has been complied with at the date of the transfer, the date of the transfer in relation to the Board order, the successor or assign's knowledge of the Board proceeding at the date of the transfer, and, where he pleads lack of knowledge, the reasons advanced for such ignorance. It would be impracticable, if not impossible, to attempt to envisage every possible set of circumstances which may arise, and to determine in advance the obligations of the persons involved. For present purposes, however, the Board's position may be stated as follows: one who takes over a continuing business and operates it in the place of an employer found by the Board to have engaged in unfair labor

practices is bound by the order from and after the date he has notice or knowledge of such order.[13]

Congress declared in Section 1 of the Act that it is the policy of the United States to foster and protect "the right of employees to organize" and the "practice and procedure of collective bargaining." It vested in the Board to duty to carry out this policy and empowered it "to prevent any

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[13] Questions may arise as to the liability of a "successor" or "assign" where at the time of the transfer of the business the Board case has not proceeded to a final order. It is most unlikely that any such question would arise where the transfer occurred prior to the hearing before the trial examiner at which the evidence is adduced, because the fact of the transfer in this situation would be developed at the hearing and the Board order could then be framed, not solely in terms of successors and assigns, but with specific reference to the parties involved in the transfer. Compare *Matter of South Carolina Granite Company*, decided by the Board October 28, 1944, 15 L. R. R. 346. As to a transfer subsequent to a hearing before the trial examiner, the same rule would seem to apply as in the case of a transfer after the Board order. However, the present case involves no question of a transfer prior either to Board order or court decree.

The problem of a transfer made without notice or knowledge on the part of the transferee of the Board proceeding or court decree is also one most unlikely to arise and, so far as the Board is aware, has never occurred. The purchaser of a going business would, in the course of his investigation prior to purchase, in all probability become aware of any pending or completed litigation arising out of labor difficulties. Certainly the petitioner here is in no position to complain in behalf of a presently unknown successor or assign without notice, since petitioner would be fully able, if not indeed affirmatively obliged, to inform any prospective successor or assign of the present proceedings.

person from engaging in any unfair labor practice * * * affecting commerce" (Section 10 (a)). It provided that the Board might issue orders requiring any person found to have engaged in unfair labor practices to cease and desist from such practices and to take such affirmative action "as will effectuate the policies of the Act" (Section 10 (c)). "* * * When Congress wants to give wide discretion it uses broad language * * * The 'policies' of the Act were so broadly defined by Congress that the determination of 'the relation of remedy to policy is peculiarly a matter for administrative competence.' *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194." *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 616.

We believe that there is implicit in the broad administrative powers vested by Congress in the Board the authority not only to make such orders as are reasonably necessary to carry out the policies of the Act but to direct such orders to such persons as may be necessary in order to make its orders fully effective. It would seem, further, that the guarantee to employees of full freedom of association for the purpose of collective bargaining or other mutual aid and protection (Section 1 of the Act) could be frustrated if a mere change in the ownership of a continuing business had the effect of depriving injured employees of the remedial benefits provided under the Act.

As this Court stated in *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364, "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices."[14] It is important, therefore, that Board orders, like orders enjoining violations of the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. Sec. 201, *et seq.*), should "in appropriate circumstances be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons." *Walling* v. *Reuter*, 321 U. S. 671, 674. This is the view expressed by the Circuit Court of Appeals for the Third Circuit in *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494. In that case the respondent, in its answer to the Board's petition for enforcement, alleged that it had, subsequent to the Board's order, dissolved and ceased to exist except for the purposes of prosecuting and defending suits and urged that the court's decree should not run against its successors and assigns. The court, in rejecting this latter contention, stated at pp. 498–499:

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[14] To like effect see, *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 337; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 552; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 193; *Walling* v. *Reuter Co.*, 321 U. S. 671, 674–675.

> * * * we see good reason under the circumstances why the order should, as is customary, run against the Company's successors and assigns. It is not suggested that the property has been liquidated or that the business does not continue as an operating unit. Under these circumstances the Board may well find that it will effectuate the policies of the Act for the new owners of a continuing manufacturing establishment to rectify the unfair labor practices of former owners of the establishment.

"It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace." *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6). It can make little difference to the employees who continue the same work in the same place of business that there has been a change in ownership of the business or in the name of their employer. In large industries many employees have probably never seen all or some of the owners of the business for which they work. It is their immediate supervisors with whom they have their day-to-day contact and whose reactions to their self-organization give them most concern. If the successor to the employer found to have engaged in unfair labor practices does not disturb this normal relation of the employees to their work and to their supervisors, then for all prac-

tical purposes in the eyes of the employees, the business and their employer is, the same as before. The successor of an employer found to have engaged in unfair labor practices occupies a position not unlike that of the owner of a business who, although he has not encouraged, sanctioned or even known of coercive conduct by his supervisory employees, is held legally responsible for their conduct.[15] The test of responsibility is whether the employees might reasonably believe that the supervisors are acting for and on behalf of management, and it can make little difference to the employees whether the same owner or a successor is operating the business if the supervisors who are believed by the employees to be acting for management have not changed. If a change in ownership were to eliminate the force of the injunction, the same superintendents and foremen whose acts led to the original injunction could again engage in unfair labor practices without risking contempt charges. Clearly, ownership should not, in itself, be deemed a "matter of controlling significance from the standpoint of the public interest." *National Labor Relations Board* v. *Adel Clay Products Co.*, 134 F. (2d) 342, 346 (C. C. A. 8). See also *National Labor Relations*

[15] See e. g. *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 520; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80.

Board v. *Keystone Freight Lines*, 126 F. (2d) 414 (C. C. A. 10).

Consideration of the continuity of group relationship between employees and supervisory personnel in a business which is sold as a going concern indicates the strong need for giving effect to Board orders even after a change in ownership. Employees must be assured that supervisors who once were part of an anti-union organization are no longer free to continue anti-union conduct. Employees must be assured that members of their group who lost their employment through a discriminatory discharge may resume their place in the group and be made whole for loss in pay. Employees must be assured that employer-sponsored unions cannot be recognized by the new owners. Employees must be assured that the new employer cannot benefit from the former owner's refusals to bargain.

The importance of protecting the employee-employer relationship, regardless of change of ownership, has frequently been recognized by unions and employers in their labor contracts. A number of agreements explicitly state that the agreement is binding on the successors and assigns of the employer and others provide that the employer must use its influence with any successor in order to preserve the existence of the agreement.[16] Indeed, even where the agreement itself

[16] See U. S. Bureau of Labor Statistics, Bull. No. 686, *Union Agreement Provisions* (1942), pp. 211–212; and *Col-*

makes no provision for the extension of its terms to a successor, it is usual for the new owner of a continuing business, operating with the same supervisory and other employees, to recognize the contract which he found in existence when he took over the business as binding upon him." In the interest of industrial peace, neither the stabilized relationships resulting from the fruition of collective bargaining contracts nor the assurances given employees by Board orders should be disturbed merely because of a change in ownership.

The Board's position that its orders should run with the continuing business rests upon its conception of the public interest sought to be protected by the Act. It may be noted, however, that similar principles have occasionally been applied by courts of equity in the protection of private rights. For example, in *United Gilpin Corp.* v. *Wilmore*, 100 Col. 453, 68 P. (2d) 34, an injunction had issued against a mining company, "its agents, employees, representatives, successors and assigns" permanently enjoining them from discharging certain waste products into a stream

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lective Bargaining Contracts, pp. 430–431, 433, published by the Bureau of National Affairs, Inc., of Washington, D. C.

[17] See *Matter of Greater New York Broadcasting Corp.*, 48 N. L. R. B. 718, 726–729; *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 343, reversing 137 F. (2d) 46, 48–50 (C. C. A. 5); *Burley* v. *Elgin, J. & E. Ry. Co.*, 140 F. (2d) 488, 489 (C. C. A. 7), pending on certiorari, No. 169, this Term.

which ran over the property of complainants. Later, the mining property was sold under foreclosure and the purchaser sold to another mining company which was in no way connected with the defendant in the injunction suit. The second mining company, although it knew of the injunction, began discharging waste products into the stream. The court, in finding this successor and assign in contempt of its decree, stated (68 P. (2d) at p. 35):

> The history of this litigation leading to the injunctive order clearly discloses the intent to enjoin the doing of a thing, more directly than the restraint of that thing being done by any particular party or parties. In effect, it is a restriction or restraint running with future operations of the property involved.[18]

This Court has, upon several occasions, recognized that the principles applied in the *United Gilpin* case, *supra*, "may be applied in fuller measure in furtherance of the public interest * * * than if any private interests were involved." *Walling* v. *Reuter Co.*, 321 U. S. 671, 674; *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 552.[19]

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[18] See also *Aluminum Colors, Inc.* v. *The Empire Plating Co.*, 5 F. Supp. 687 (N. D. Ohio 1933); *G. & C. Merriam Co.* v. *Saalfield*, 190 Fed. 927 (C. C. A. 6).

[19] *Chase National Bank* v. *City of Norwalk*, 291 U. S. 43; *Scott* v. *Donald*, 165 U. S. 107; and *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, cited by petitioner in its brief

Each change in status or identity of an offending employer usually involves a complicated set of facts which should be carefully investigated and weighed in dealing with the problem of securing compliance with Board orders. Whether the change results in the ownership or operation of the "business" of the offending employer by a successor or assign, and the extent to which such successor or assign should be required to comply with a Board order, are questions of fact "properly to be resolved by the Board on direct resort to it, or by the court if contempt proceedings are instituted." *Southport Co.* v. *National Labor Relations Board*, 315 U. S. 100, 106.[20]

(pp. 7–9), do not support its contention that Board orders cannot properly be directed against successors and assigns. In the *Chase* and *Scott* cases injunctive orders were held improperly directed against persons who neither occupied the position of successor or assign nor were in any way connected with or in confederacy with the defendant. In the *Hitchman* case, an injunction was held to have improperly issued against persons specifically named in the order but upon whom no process had been served. In any event, the Board's authority to effectuate the policies of the Act is not as circumscribed as the powers of equity courts to protect private rights. Cf. *Securities Commission* v. *Chenery Corp.*, 318 U. S. 80.

[20] To like effect, see *Walling* v. *Reuter*, 321 U. S. 671; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 235; *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 302 (C. C. A. 6); *National Labor Relations Board* v. *Bachelder*, 125 F. (2d) 387, 388 (C. C. A. 7); *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. (2d) 295, 302 (C. C. A. 6); *National Labor Relations Board* v. *Gluck Brewing Co.*, 14 L. R. R. 791 (C. C. A. 8); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 650–651 (App. D. C.).

Sometimes subsequent to the issuance of a Board order but prior to its enforcement, the Board receives from the employer an offer to adduce additional evidence for the purpose of showing that it has ceased to operate or that some change in its legal status or ownership has occurred. In such event the Board may reopen the case, receive the additional evidence, and issue such order as it may deem appropriate under the circumstances;[21] or it may seek a decree for the enforcement of its order, then proceed to secure compliance in such manner as the facts may warrant.[22] By proceeding in this manner, much time can be saved in obtaining redress for

[21] See, e. g., *National Labor Relations Board* v. *Timken Silent Automatic Co.*, 114 F. (2d) 449 (C. C. A. 2).

[22] See, e. g., *Southport Co.* v. *National Labor Relations Board*, 315 U. S. 100, where subsequent to this Court's affirmance of a decree of enforcement by the Circuit Court of Appeals for the Fifth Circuit, the Board obtained compliance in full from what the Board determined to be the successor and assign of the offending employer; *National Labor Relations Board* v. *Blackstone Mfg. Co., Inc.*, 123 F. (2d) 633 (C. C. A. 2), where the Board determined that the parent corporation to which the business of Blackstone was transferred was not a successor and where no compliance was obtained; *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494 (C. C. A. 3), in which contempt proceedings against an alleged successor and assign are now pending; *National Labor Relations Board* v. *Tupelo Garment Co.*, 122 F. (2d) 603 (C. C. A. 5), in which the court disagreed with the Board's contention that certain new corporations were successors of the offending employer and refused to hold the new corporations in contempt of its decree enforcing a Board order.

the unfair labor practices. Moreover, problems created by changes in ownership, whether before or after entry of an enforcement decree, are frequently settled by adjustment or agreement between the parties. The adjustment of these problems through the administrative processes of the Board is an important function of the Board, for it is through such adjustments that employees are assured an expeditious vindication of the rights accorded them under the Act.[23]

The fact that Board orders are directed against successors and assigns, thus putting them on express notice that the orders are meant to bind them to the full extent of the statutory authority of the Board, undoubtedly facilitates the making of these adjustments. The parties, however, need not submit to any determination of their status with which they disagree or to any demand for compliance which they think is unreasonable, for no one but a court may hold them in contempt and the court may act only after the Board institutes contempt proceedings. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261. Moreover, it is well recognized that

[23] The necessity of a speedy remedy for violations of the Act in order to effectuate its policies was recognized by Congress when it passed the Act. See the Conference Report on the bill which became the Act. (H. Rep. 1371, 74th Cong., 1st Sess., p. 5). See also Section 10 (i) of the Act, which provides that petitions for enforcement or review "shall be heard expeditiously, and if possible within 10 days after they have been docketed."

a court will hold a person in contempt only after receiving "clear and convincing" proof,[24] and even after he has been adjudged in contempt of a decree enforcing a Board order, he is customarily given a reasonable time within which to purge himself by taking the requisite remedial action for compliance before he is penalized.[25]

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[24] *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 137 F. (2d) 77, 80 (C. C. A. 8); *National Labor Relations Board* v. *Tupelo Garment Co.*, 122 F. (2d) 603, 606 (C. C. A. 5).

Except in the *Hopwood* case, *supra*, involving an *alter ego* type of successor, no successor or assign has ever, as yet, been adjudged in contempt of a court decree enforcing a Board order.

[25] The opinion of this Court in the *Southport Petroleum* case, 315 U. S. 100, is not opposed to the construction for which the Board contends. In that case this Court upheld the action of the Circuit Court of Appeals for the Fifth Circuit in denying a petition by Southport, the offending employer, to adduce additional evidence for the purpose of showing a dissolution of Southport subsequent to the Board's order and purchase of its business by an alleged new employer. Southport's allegations did not negate the possibility that the new employer might be merely a disguise of or straw man for Southport. As this Court noted (315 U. S. at 106) "a *bona fide* discontinuance and a true change of ownership" would terminate Southport's duty under the order to reinstate discriminatorily discharged employees, although some liability on its part for back pay would unquestionably exist; but, regardless of any termination of Southport's liability, since the Board's order ran not only against Southport but also against its "officers, agents, successors, and assigns," it still was possible that the Board's order might "yet be the basis—and the indispensable basis—of liability on the part of any of these persons" (p. 107). Because all of the facts regarding the dissolution and trans-

The scope of the decree in the present case

The court below entered a decree enforcing the Board's order, without discussing the question of the scope of the provision here involved (R. 287–291).[26] It is not clear how the "successors and assigns" provision is construed by the Circuit Court of Appeals for the Second Circuit. The only case which sheds light upon the matter is *National Labor Relations Board* v. *Blackstone Mfg. Co.*, 123 F. (2d) 633, 635,[27] in which the court, in an opinion by Judge Learned Hand, refused to delete the provision from its decree of enforcement:

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fer were not before the Court, it could not pass on whether liability actually existed.

This Court thus apparently assumed that the provision of the Board's order making it effective against successors and assigns was proper, but since Southport had not complained of the form of order in so far as it was directed against successors and assigns, the question was not directly before the Court for decision.

[26] The *per curiam* opinion stated merely (R. 289): "The respondent complains of the order in certain other details; but, so far as we find it necessary to take any notice whatever of these, it is enough to refer to our decisions in *National Labor Relations Board* v. *Blackstone Mfg. Co.*, 123 Fed. (2) 633, 635; *National Labor Relations Board* v. *Standard Oil Co.*, 138 Fed. (2) 885, 888."

[27] Cf. *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97 (C. C. A. 2), and *National Labor Relations Board* v. *Timken Silent Automatic Co.*, 114 F. (2d) 449 (C. C. A. 2), both decided prior to the *Blackstone* case. In the *Hopwood* case, the court below set aside the Board's order insofar as it was directed against the Monarch Company, a successor and *alter ego* of Hopwood, on the ground that no charges against Monarch had been filed but it indi-

> In allowing these words to stand we wish to make it clear, however, that we do not hold that a "successor" or an "assign" will be in contempt of our order if it should (even after notice of the order, but without participating with the respondent in any disobedience by it) do exactly those things which the order forbids. In other words, we do not hold that those words impose any liability which would not exist without them.

If this is taken to mean that the court below will enforce the provision only against a "disguised continuance", or *alter ego* of the old employer (within categories (1) and (2), discussed above), this Court, for purposes of the present case, will

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cated that Hopwood might "be required to secure the cooperation of its agent, Monarch" in complying with the Board's order. In contempt proceedings later brought by the Board against both Hopwood and Monarch (104 F. (2d) 302), the court found both parties guilty. In the *Timken* case, the court (with Judge Clark dissenting) dismissed, as to a parent corporation which had agreed to assume and discharge the obligations of Timken, a dissolved corporation found by the Board to have engaged in unfair labor practices. The court apparently refused to hold the parent corporation responsible for remedying the unfair labor practices of its subsidiary because the agreement by the parent corporation to assume and discharge the obligations of its subsidiary did not make "the two corporations one entity in law and that alone is of present importance." However, the court later in the *Blackstone* case, at p. 635, stated that it had in the *Timken* case "left open to the Board to prove that [the parent company] might so participate in future contempts of its subsidiary, the respondent, as to become a party to the subsidiary's disobedience and be punishable for that reason." Cf. *Alemite Mfg. Corp.* v. *Staff*, 42 F. (2d) 832 (C. C. A. 2).

presumably deem it unnecessary to consider the extent to which a Board order, when enforced without limitation, may hold the new owner of a continuing business (category (3), *supra*, pp. 18–27). It is possible, however, that in view of the pointed phraseology employed by Judge Hand, the *Blackstone* case should be regarded as reserving rather than foreclosing the question of liability on the part of a new owner.[28]

On the latter view of the *Blackstone* case, and assuming the Court accepts the substance of our argument, there would seem to be two alternatives open to the Court. (1) If the Court is satisfied that "successors and assigns" may appropriately be used to define the obligations of the bad faith successor or assign or *alter ego*, the Court might reserve, as did the court below, the question of liability of a so-called good faith successor or assign. In this connection, it may be noted that the petitioner requested neither the Board nor the court below to clarify this provision. (2) If the Court should be of the opinion that the "successors and assigns" provision should be more precisely defined, we submit that the construction made by the Board, as stated in

[28] The Board having exercised its full statutory power to hold successors and assigns, this latter view of the *Blackstone* case leaves open the power of the Board in this regard and the consequent scope of the decree as applied to new owners. Since the determination of this question does not call into play the exercise of judicial discretion but is rather one of statutory power, it would seem necessarily to be before the Court on the present certiorari.

this brief, should be accepted by this Court. The holding of *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 341, that "Questions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings * * *" would seem to point to this disposition of the case, and for the reasons there stated, we believe this the preferable alternative. Whatever further doubts may be inherent in the form of the provision may be resolved in an appropriate proceeding for modification or clarification of the order and decree, whenever the question should become important in a practical sense. So far as the present case is concerned, the decisive consideration would seem to be that no circumstances have arisen which call the scope of the provision into question.

CONCLUSION

For the reasons set forth, we respectfully submit that the Board's practice of directing its orders against the successors and assigns of an offending employer, as well as against the employer and its officers and agents, is a sound exercise of the broad administrative discretion given the Board under the Act to prevent and

remedy unfair labor practices, and that the court below did not err in this case in sustaining the Board's order in that respect.

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DECEMBER 1944.

APPENDIX

National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*):

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

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It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor

practice (listed in section 8) affecting commerce. * * *

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(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

U. S. GOVERNMENT PRINTING OFFICE : 1944

SUPREME COURT OF THE UNITED STATES.

No. 86.—October Term, 1944.

Regal Knitwear Company, Petitioner, *vs.* National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 29, 1945.]

Mr. Justice Jackson delivered the opinion of the Court.

The National Labor Relations Board, after appropriate proceedings, issued a cease and desist order against the petitioner, 49 N. L. R. B. 560, and thereafter obtained from the Circuit Court of Appeals for the Second Circuit an order for its enforcement. 140 F. 2d 746. We granted certiorari, limited to a single question on which there was a conflict in practice between different circuits. 323 U. S. —. The Board has followed the formula which orders not only a particular respondent, but also "its officers, agents, successors and assigns" to cease and desist. The question is whether enforcement will be granted without deleting "successors and assigns" from those enjoined. The Circuit Court of Appeal for the First, Second, Third, Fourth, and Eighth Circuits, and the Court of Appeals for the District of Columbia have upheld the authority of the Board to include such a provision.[1] In some of these cases change of ownership was shown to be probable and in other cases there was no such proof. The Second Circuit, in refusing to delete the provision, said: "In allowing these words to stand we wish to make it clear, however, that we do not hold that a 'successor' or an 'assign' will be in contempt of our order if it should (even after notice of the order, but without participating with the respondent in any disobedience by it) do exactly those things which the order

[1] National Labor Relations Board *v.* Brezner Tanning Co., 141 F. 2d 62, 65 (C. C. A. 1st); National Labor Relations Board *v.* Blackstone Mfg. Co., 123 F. 2d 633, 635 (C. C. A. 2d); National Labor Relations Board *v.* Weirton Steel Co., 135 F. 2d 494, 498-99 (C. C. A. 3d); National Labor Relations Board *v.* Landis Tool Co., 15 L. R. R. 183, 185 (C. C. A. 3d); National Labor Relations Board *v.* Jac. Feinberg Hosiery Mill, Inc., 134 F. 2d 620 (C. C. A. 4th); National Labor Relations Board *v.* Glusk Brewing Co., 14 L. R. R. 791, 795 (C. C. A. 8th); Bethlehem Steel Co. *v.* National Labor Relations Board, 120 F. 2d 641, 650-51 (App. D. C.).

forbids. In other words, we do not hold that those words impose any liability which would not exist without them." *National Labor Relations Board* v. *Blackstone Mfg. Co.*, 123 F. 2d 633, 635; see also *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. 2d 641, 650-51 (App. D. C.). The Circuit Court of Appeals for the Seventh Circuit, on the other hand, consistently eliminates the provision as to successors and assigns from the order,[2] but recognizes that successors or assigns under some circumstances are bound by the Board's order, even without the words.[3]

When one court of appeals strikes out the provision but says its absence may in some circumstances have the same effect as if it were there, and another court of appeals approves the provision but says its presence may have no more effect than if it were out, there is more than a faint suggestion that the conflict is over semantics rather than over practical realities.

The formula that includes successors and assigns, among others, is one probably borrowed from the jargon of conveyancing. Doubtless these words often are used, not out of consideration of their appropriateness, but because of their familiarity. Courts of equity sometimes have used this formula in their decrees.[4] Before the enactment of the Labor Relations Act the Federal Trade Commission issued orders containing these familiar provisions.[5] The Securities and Exchange Commission has done the same.[6] The Bituminous Coal Division of the Department of the Interior does likewise.[7] The National Labor Relations Board has

[2] National Labor Relations Board v. Bachelder, 125 F. 2d 387, 388; National Labor Relations Board v. Stone, 125 F. 2d 752, 757. The Sixth Circuit has also refused in one case to include the phrase. National Labor Relations Board v. Cleveland-Cliffs Iron Co., 133 F. 2d 295, 302.

[3] See also In re Lennon, 166 U. S. 548; International Brotherhood of Teamsters v. Keystone Freight Lines, Inc., 123 F. 2d 326, 329; National Labor Relations Board v. Cleveland-Cliffs Iron Co., 133 F. 2d 295, 302.

[4] See United States v. Pullman Co., Civil Action No. 994, E. D. Pa. 1944; United States v. Vehicular Parking, Ltd., Civil Action No. 259, D. Del. 1944; Aluminum Colors Inc. v. Empire Plating Co., 5 F. Supp. 687; United States v. Great Lakes Towing Co., 1 Decrees and Judgments in Federal Antitrust Cases, 253-54 (N. D. Ohio, 1915); United Gilpin Corp. v. Wilmore, 100 Colo. 453, 456, 68 P. 2d 34, 35.

[5] Matter of Superior Woolen Mills, 8 F. T. C. 283, 288 (1924); Matter of American Snuff Co., 11 F. T. C. 144, 160 (1927); Matter of The Sherwin-Williams Co., 36 F. T. C. 25, 72, 74 (1943).

[6] Securities and Exchange Commission v. Aldrich Blake, Inc., 1 S. E. C. Jud. Dec. 19, 21.

[7] Matter of Cove Hill Coal Co., 7 F. R. 7572, 7574; Matter of Waltrip & Sons, 7 F. R. 7864.

employed this formula consistently since 1937,[8] and some state labor boards have followed the example.[9] Not only have circuit courts of appeals, except of the Seventh Circuit, generally enforced orders containing this provision, but this Court has several times done so. *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 106, note 6.[10]

The dearth of cases in which actual controversies have been precipitated by this more general than discriminating use of this ritual indicates that its significance both for good and ill is greater in anticipation than in retrospect.

Administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority and, where the infirmity is inadequacy of findings to show appropriateness of the choice made in the particular case, are ordinarily entitled to have the case remanded for further consideration. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194; *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 616. The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law. *Chase National Bank* v. *Norwalk*, 291 U. S. 431, 436-37; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 234; *Scott* v. *Donald*, 165 U. S. 107, 117; *Alemite Mfg Corp* v. *Staff*, 42 F. 2d 832.

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[8] Matter of Hill Bus Co., 2 N. L. R. B. 781, 800.

[9] Matter of The Great Atlantic & Pacific Tea Co., Case No. CU-333, New York State Labor Relations Board; Matter of W. T. Grant Co., Case No. 82, Pennsylvania Labor Relations Board.

[10] Citing Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, enforcing, as modified, 4 N. L. R. B. 71, 108; National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co., 308 U. S. 241, enforcing 8 N. L. R. B. 866, 877; National Labor Relations Board v. Falk Corp., 308 U. S. 453, enforcing 6 N. L. R. B. 654, 666; National Labor Relations Board v. Waterman Steamship Corp., 309 U. S. 206, enforcing 7 N. L. R. B. 237, 252; National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, enforcing 12 N. L. R. B. 854, 883; Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, enforcing, as modified, and remanding 19 N. L. R. B. 547, 603.

It is suggested, at least inferentially, that National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, is authority against the position of the Court in the case at bar. However, the order there under review contained these same words. Matter of Express Publishing Co., 13 N. L. R. B. 1212, 1226. While this Court limited the enforcement order in certain other respects it did not strike the words "successors and assigns." The issue was not passed on, but its very absence from a case concerning permissible breadth of orders suggests the innocuous character of the provision as compared with that passed on in the Express case.

The Federal Rules of Civil Procedure provide that: "Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."[11] This is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them, or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

The term "successors and assigns" in an enforcement order of course may not enlarge its scope beyond that defined by the Federal Rules of Civil Procedure. Successors and assigns may, however, be instrumentalities through which defendant seeks to evade an order or may come within the description of persons in active concert or participation with them in the violation of an injunction. If they are, by that fact they are brought within scope of contempt proceedings by the rules of civil procedure. We have indicated that Labor Board orders are binding upon successors and assigns who operate as "merely a disguised continuance of the old employer." *Southport Petroleum Co.* v. *Labor Board*, 315 U. S. at 106. We have also said of an injunction to restrain violation of the Fair Labor Standards Act, which is somewhat analogous to Labor Board orders, that "Not only is such an injunction enforcible by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred whether as a means of evading the judgment or for other reasons." *Wadling* v. *Reuter*, 321 U. S. 671, 674. In both of these cases the reference is not merely to succession, but to a relation between the defendant and the successor which might of itself establish liability within the terms of Rule 65.

We do not undertake to decide whether or under what circumstances any kind of successor or assign will be liable for violation of a Labor Board order. It is true that we have said that "Ques-

[11] Rule 65(d), which is derived from § 19 of the Clayton Act, 38 Stat. 738; 28 U. S. C. §383.

tions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings." (*J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 341). But it is apparent from Rule 65, and from the views of one circuit court of appeals as to the narrow effect of the words in the order and of another as to the broad effect of the order without the words, that whether one brings himself in contempt as a "successor or assign" depends on an appraisal of his relations and behavior and not upon mere construction of terms of the order. If defendants enter upon transactions which raise doubts as to the applicability of the injunction, they may petition the court granting it for a modification or construction of the order. Cf. *New Jersey* v. *New York City*, 296 U. S. 259. While such relief would be in the sound discretion of the court, we think courts would not be apt to withhold a clarification in the light of a concrete situation that left parties or "successors and assigns" in the dark as to their duty toward the court. Enforcement orders are issued to effectuate the purposes of the Act, not for the entrapment of parties, and courts no less than parties desire to avoid unwitting contempts as well as to punish deliberate ones.

No concrete case is before us. We have here an abstract controversy over the use of these words, and it is as sterile as abstract controversies usually are. The employer objects to the words of the order merely as words. They do not enlarge its own obligation, and if it complies with the order, little by way of obligation could be passed to a successor or assign by the order that is not in any event imposed by statute. The Board is not here attempting to reach or to hold anyone in contempt by virtue of such orders. No successor or assign appears before us complaining that these words put him in jeopardy. No one can be punished for contempt because of these words until after a judicial hearing, in which their operation could be determined on a concrete set of facts. All that is before us is the question whether we will hold abstractly that this provision is an illegal one to include in a cease and desist order of the Labor Board or an enforcement order of the Court.

Whether it is wise that an order attempt to define its own effect on others than parties to the action when the law has already done so is not for us to say. We cannot say that "successors and assigns" as well as "officers and agents" may not under some circumstances be among those reached by the order within the scope

of Rule 65 and hence cannot say that it is not a permissible provision.

Affirmed.

Mr. Chief Justice STONE, dissenting, with whom Mr. Justice ROBERTS and Mr. Justice REED concur.

An injunction is a continuing threat to those named as subject to it, of the pains of contempt proceedings if they disobey its provisions. The opinion of the Court recognizes that the present injunction running against the employer's "successors and assigns" purports to include within its sweep some who are not subject to its command and is thus a threat to those over whom the Court has no authority. The opinion also admits that the persons who are bound by the present decree would be as effectively bound if the decree were to omit the words "successors and assigns." See *Walling* v. *Reuter Co.*, 321 U. S. 671, 674-675, and cases cited.

It has long been deemed to be an abuse of power for a federal court to enjoin practices in which a defendant has not engaged and which are unrelated to those which may be properly enjoined. See *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, and cases cited. To me it seems no less a misuse of authority for a court, as well as for the Labor Board itself, to threaten those who are not subject to its command. This is the more so where the tendency of the threat is to inflict an unauthorized penalty on the employer by deterring third persons from dealing with him to acquire his property and business, in circumstances in which that may lawfully be done.

That there have been numerous cases before this Court where the Board's order has not been challenged in this respect, is significant only as showing how extensive the abuse has become and how ready employers and the lower courts have been to acquiesce in threatened wrong when the injury seemed not to be immediate. But these are not reasons for our acquiescence, when the question is brought to us for decision for the first time. It is no part of the function of the Board or of courts to make unwarranted threats against suitors or innocent third persons. Such misleading and unwarranted use of the phrase should be avoided, either by striking it from the decree or so qualifying it as to designate the class of "successors and assigns" to whom it may be lawfully applied. Cf. *Southport Co.* v. *Labor Board*, 315 U. S. 100, 107.